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In the Supreme Court of the United States

OCTOBER TERM, 1936.

No. 505.

MANHATTAN PROPERTIES, INC.,

Petitioner,

v.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Oliver A. Olson Co., Inc.

No. 506.

SAMUEL R. BROWN *et al.*,

Petitioners,

v.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF ARTHUR A. BALLANTINE, AS AMICUS CURIAE.

ARTHUR A. BALLANTINE,
Attorney for Charles D. Hilles, Eugene W. Leake and Charles E. Richardson, Trustees in Bankruptcy of Paramount Publix Corporation, as amicus curiae.

ARTHUR A. BALLANTINE,
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Of Counsel.

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF OF ARTHUR A. BALLANTINE, ATTORNEY FOR CHARLES D. HILLES, EUGENE W. LEAKE AND CHARLES E. RICHARDSON, TRUSTEES IN BANKRUPTCY OF PARAMOUNT PUBLIX CORPORATION, AS AMICUS CURIAE.

Introductory Statement.

These cases present the question whether the claim of a landlord, whose lease has been rejected by a trustee of the bankrupt estate of the tenant, may be proved against

such estate, where the only obligation of the tenant surviving the landlord's reentry is a covenant to indemnify the landlord against actual loss of rent during the residue of the term.

In the decisions under review the Court of Appeals for the Second Circuit affirmed rulings of the District Court for the Southern District of New York that such a claim was not provable. 66 F. (2d) 470, 473. The applicable provisions of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. C. Title 11), are quoted in the margin.*

The decisions in these cases will control the disposition of a large number of claims which have been filed against the bankrupt estate of Paramount Publix Corporation. If, contrary to what has been the general understanding, claims for future rent should now be held provable in bankruptcy, and should be liquidated on the basis of the depressed level of rentals now existing, persons who loaned money, sold merchandise or furnished services to this bankrupt, might be forced to concede a large share of the assets of their debtor to persons whose claims did not appear in the balance sheet of the debtor and *who may never suffer any actual loss.*

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* Section 63 provides, so far as here material:

> "a. Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract express or implied."
>
> "b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Subdivision 11 of Section 1 provides:

> "'Debt' shall include any debt, demand or claim provable in bankruptcy."

It was held in *Dunbar* v. *Dunbar*, 190 U. S. 340 (1903), that paragraph b of Section 63

> "adds nothing to the class of debts which might be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63*a*, to be liquidated as the court should direct."

Statement of the Facts.

We shall summarize at this point the few controlling facts in the cases under review.

No. 505, *Manhattan Properties, Inc., Petitioner,* v. *Irving Trust Company,* involves a lease for a term commencing February 1, 1928 and terminating October 1, 1937 (R. 3). The lease was made in New York and the premises were located in New York. The lease provided that if the tenant should default in the payment of rent or if bankruptcy proceedings should be instituted by or against the tenant, the landlord might re-enter and relet the premises as the tenant's agent (R. 13). The lease further provided that in the event of such re-entry (R. 13-14):

> "The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord; the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder."

The tenant thereafter filed a voluntary petition in bankruptcy. The claim which was disallowed was for $25,000,—the difference between the rent and the estimated rental value from April 1, 1932 to October 1, 1937 (R. 2).

No. 506, *Samuel R. Brown, et al., Petitioners* v. *Irving Trust Company*, involves a lease for a term commencing July 1, 1920 and expiring June 30, 1945 (R. 5). The premises were located in Nebraska. The place of the making of the lease does not appear. The lease provided that on default by the lessee or its adjudication in bankruptcy, the lessor might enter upon the premises and that upon such entry, the lease should terminate (R. 7). The lease continued as follows:

> "* * * the Lessee covenants that in case of such termination it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination, during the residue of the term above specified."

On August 29, 1932, the tenant filed a voluntary petition in bankruptcy (R. 1). On November 26, 1932, the lessor entered upon the demised premises (R. 4). The claim which was disallowed was for $143,615.80,—the difference between the stipulated rent of $20,000 per annum and the rental value of the premises which was estimated as $5,000 annually, for the period from November 26, 1932 until June 30, 1945.

Summary of the Argument.

It is the contention of the petitioners that a landlord's claim for loss of future rents is provable in bankruptcy like claims under other executory contracts, and that a contrary holding must rest upon antiquated learning as to the nature of leases and not upon any logic now applicable.

We contend, on the contrary, that the position that claims for loss of future rent are not provable in bankruptcy, as the Bankruptcy Act has been understood up to date, follows directly from the nature of a lease as contrasted with that of other executory contracts.

As we shall show in Point I of this brief, it is the long established doctrine of the common law that when a landlord resumes possession of leased premises he has no right to damages for loss of rent accruing after that date, unless the lease by express terms provides such a right. Because of this well understood rule as to lease claims, it has become common practice to insert in leases covenants on the part of the tenant which give the landlord certain rights that survive his reentry. This was done in the leases involved in the two cases under review. But in these covenants the tenants agreed only to indemnify their landlords against actual loss of rent accruing during the balance of the term. They did not agree to pay to their landlords the amount of an estimated loss which may never occur,—what is claimed here.

The petitioners are, in effect, asking the bankruptcy court to supply a new covenant in these leases. They are forced to contend that *Section 63a of the Bankruptcy Act has the effect of altering the common law of landlord and tenant, or of transmuting an obligation to indemnify against actual loss, when, as and if suffered, into an obligation to pay immediately the estimated amount of such loss.* In Point II of this brief we shall show that there is nothing in the language of the Bankruptcy Act, in its history, or in the decisions of this Court construing it, which gives any support to such a contention. We contend that, to the contrary, it appears in every relevant decision of this Court, either expressly or implicitly, that claims such as those here involved may not be proved against the estate of a bankrupt.

It was argued below that the action of Congress in specifically providing that claims for future rent should be provable debts in proceedings under Section 74 and 77, which were added to the Bankruptcy Act by the Act of March 3, 1933, c. 204, 47 Stat. 1467, changed the existing rule as to the provability of such claims in other proceedings under the Act. That argument was completely an-

swered in the opinion of Judge Learned Hand in No. 505 below (R. 29-30), and was abandoned in the petitions for certiorari. However, in their brief in this Court, the petitioners revive the contention in a slightly altered form. They now argue that the amendment was a declaration by Congress of what had always been its intention with regard to future rent claims. We submit that this construction is plainly untenable and, as we shall contend in Point III of this brief, that the action of Congress has a significance quite different from that attributed to it by the petitioners. Although the attention of Congress was called to this very question of the provability of landlords' claims, Congress deliberately confined the scope of its enactment to proceedings brought under the new sections added to the Act and declined to make any alteration in the doctrine applicable in ordinary bankruptcy proceedings. Certainly, in the light of this recent refusal on the part of Congress to upset the rule which has been generally understood and accepted by lawyers and business men for the past thirty-five years, no such drastic change should now be made by this Court.

POINT I.

THE PETITIONERS' CLAIMS CANNOT BE SUSTAINED EITHER ON A THEORY OF BREACH OF THE TENANTS' COVENANTS FOR RENT OR ON A THEORY OF BREACH OF THE TENANTS' COVENANTS TO INDEMNIFY THEIR LANDLORDS AGAINST LOSS OF RENT. TO GIVE THE LATTER COVENANTS THE EFFECT OF COVENANTS TO LIQUIDATE DAMAGES WOULD VARY THE AGREEMENTS OF THE PARTIES IN AN ESSENTIAL RESPECT.

The entire argument of the petitioners is based upon an asserted analogy between leases and other executory contracts. The difficulty is that while the law *might* have recognized such an analogy, it has not done so. As said by this Court in rejecting a similar argument in *Gardiner* v. *Butler & Co.*, 245 U. S. 603 (1918):

> "Of course, there are plausible analogies for the contention. But the law as to leases is not a matter of logic *in vacuo*; it is a matter of history that has not forgotten Lord Coke."

The doctrines of the law of landlord and tenant, upon which commercial transactions have been conducted up to this time, cannot now be dismissed as of mere antiquarian interest.

It has long been the rule of the common law that a landlord who has reentered and terminated a lease* has no further claim against the tenant on his covenant for rent.

> *Bird* v. *Defonvielle*, 2 C. & K. 415 (1816);
> *Hall* v. *Burgess*, 5 B. & C. 332 (1826).

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* This is clearly the situation in No. 506 (R. 4). It does not appear from the record in No. 505 whether or not the landlord had reentered at the time of the hearing on the claim. But since the claim is for the difference between the stipulated rent and the estimated rental value of the premises, the claim necessarily assumes that such reentry will occur.

This rule is law in New York. *McCready* v. *Lindenborn*, 172 N. Y. 400 (1902). The rule applies even where the lease provides, as in No. 505, that the landlord may relet as the tenant's agent. *Hermitage Co.* v. *Levine*, 248 N. Y. 333, 337 (1928). We have found no authority indicating the existence of a different rule in Nebraska.

This rule does not deprive the landlord who has re-entered, merely of the right to maintain actions for the instalments of rent as they become due; it deprives him of *all* claims based on the tenant's covenant to pay rent. Accordingly, he cannot recover damages for the loss of his bargain, whether such damages are estimated or actual. This principle applies equally whether the attempt is made in an action at law or by a proof of claim in receivership or bankruptcy. The rule was stated by this Court in *Gardiner* v. *Butler & Co.*, *supra*:

> "The second claim * * * is for damages similar to those held allowable under the former lease, *but simply on the ground that the petitioner has lost the benefit of his bargain from the time of his re-entry, the lease not containing any clause stipulating for such an allowance.* Of course there are plausible analogies for the contention. But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke. Massachusetts has followed the English tradition and we believe that it is the general understanding in that State that *in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee.* *Sutton* v. *Goodman*, 194 Massachusetts 389, 395. *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, 590. Upon this claim the decree below is affirmed." (Italics ours.)

Even where there is no termination of the lease, the landlord cannot, in the absence of special covenant, immediately recover the difference between the stipulated rent and the estimated avails of reletting. In such a case the term continues in the tenant, and the landlord's remedy is to sue for the monthly instalments of rent as they become due. In *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, 589-590 (1916), this Court recognized that the doctrine of anticipatory breach of contract has no application in the case of leases of real property. See also

Miller v. *Benton*, 55 Conn. 529 (1887);
Connolly v. *Coon*, 23 Ont. App. 37 (1896);
McCready v. *Lindenborn*, 172 N. Y. 400 (1902);
Wells v. *Twenty-First Street Realty Co.*, 12 F. (2d) 237 (C. C. A. 6th, 1926);
Phillips-Hollman v. *Peerless Stages, Inc.*, 210 Cal. 253 (1930).

The case falls within the general exception to the rule of anticipatory breach stated by this Court in *Rochm* v. *Horst*, 178 U. S. 1, 17 (1900):

> "* * * the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule."

It is clear that under the law of New York, no action lies for anticipatory breach of a lease. *McCready* v. *Lindenborn*, *supra*. See *Kottler* v. *New York Bargain House, Inc.*, 242 N. Y. 28, 35 (1926). We have found no basis for belief that a different rule is in force in Nebraska.

The law as to this matter is well summed up on page 38 of the petitioners' brief in this Court:

> "This point is that rent is the consideration for possession, and when possession is resumed by the landlord, the covenant to pay rent is terminated.

> and as the allowance of a claim for damages for loss of future rents necessarily involves resumption of possession by the landlord, the only covenant on which a claim could be based is cancelled, unless there is an indemnity covenant substituted for the covenant to pay rent."

It follows from this doctrine that breach or repudiation of a lease does not give rise to a claim against a solvent lessee for damages for breach of his promise to pay rent. The petitioners have not been able to point to anything in the Bankruptcy Act which justifies a bankruptcy court in disregarding this established doctrine as to leases.

It was precisely because of these rules of the common law that the practice developed of including in leases, in addition to the covenant for rent, other covenants on the part of the tenant which expressly survive reentry by the landlord because of the tenant's default. Such clauses, unless penal in character, are given effect. But the rights and obligations enforced are rights and obligations growing out of express contracts. The petitioners are arguing that no such contracts are necessary since the common law doctrine of landlord and tenant may be disregarded in bankruptcy, or in the alternative, that if some special covenant is necessary, its language may be disregarded if it does not suit the purpose.

The covenants as to surviving liability commonly used in leases may be broadly divided into two types. One such type is a covenant for liquidated damages. In a covenant of this type, the tenant agrees to pay the difference between the stipulated rent and the rental value *at the date of the tenant's default.* Such, for example, was the covenant in the lease involved in *William Filene's Sons Company* v. *Weed,* 245 U. S. 597 (1918), where the lessee agreed to

> "* * * pay to the lessor as damages a sum which at the time of such termination or at the time to

> which installments of liquidated damages shall have been paid, represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term."*

Under such a covenant, the tenant takes the risk that he may default under conditions of depressed rents and that he may have to pay in damages sums far in excess of the loss that the landlord will actually suffer. The landlord takes the risk that the tenant's default may occur at a date when rental values have not varied perceptibly from those prevailing at the date of the lease (or may have increased), and that he may be left uncompensated for loss through a fall in rentals thereafter. Still, the courts enforce the agreement of the parties as a liquidation of damages "upon a footing that was familiar and fair". *William Filene's Sons Company* v. *Weed, supra,* at 602.

Quite different in nature are covenants to indemnify against loss. In some cases, as in the lease involved in No. 505, the tenant agrees to pay the landlord monthly any loss which the landlord may have suffered during the preceding month. In other cases, as in the lease involved in No. 506, the tenant's covenant is only to indemnify the landlord against loss of rent during the entire residue of the term. In neither case is the landlord entitled, immediately upon reentry, to recover his estimated damages for the residue of the term.

Woodbury v. *Sparrell Print,* 187 Mass. 426 (1905);

Providence Building Co. v. *Atlantic National Bank,* 228 Fed. 814 (D. R. I., 1916);

Merchants' National Bank v. *Ryerson,* 251 Mass. 314 (1925);

Hermitage Co. v. *Levine,* 248 N. Y. 333 (1928).

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* See page 37 of the Record in the *Filene* case in this Court.

The reason was succinctly stated by Mr. Justice (then Chief Judge) Cardozo in *Hermitage Co.* v. *Levine, supra*, at 338:

> "• • • it may turn out in the end that there has been a gain and not a loss."

It is obvious, therefore, that the differences between the rights and obligations created by covenants for *liquidated damages* on the one hand, and the various types of *indemnity* covenants on the other, are of large consequence. The choice between the two types of covenant is likely to involve differences of many thousands of dollars if default occurs. In particular, it has long been recognized that the provability of a claim arising out of a covenant surviving reentry, against the insolvent estate of a tenant, depends in large measure on whether the tenant's covenant is or is not to pay a sum ascertainable as of the date of default.

The presence in the lease involved in the *Filene* case of a covenant under which the tenant's entire liability was determinable immediately upon default, was not accidental. It was an instance of a practice in Massachusetts, which had been suggested by Judge Lowell over forty years before in his opinion in *Ex parte Lake*, Fed. Case No. 7991 (D. Mass., 1877). In that case, which arose under the Bankruptcy Act of 1867, the lease provided that upon default and reentry by the lessor, the lessees:

> "• • • shall remain for the residue of said term responsible for the rent and taxes herein reserved, and shall be credited for such amounts only as shall be by the lessors actually realized."

Judge Lowell held that a claim for future rent was not provable against the bankrupt estate of the lessees, saying:

> *"If the contract were a little different and provided merely that the lessees should pay any loss or*

damage consequent upon the diminished value of the premises, the amount would be capable of ascertainment with sufficient certainty. * * * But I am unable to reach the conclusion that the stipulation in this case is calculated to work out the result. It seems to provide that the lessees, after a breach shall remain liable for the rent precisely as before, excepting that they are to be credited with any sums actually received for the use of the premises. *This brings the case unfortunately within the numerous decisions concerning rent, which, not accruing at once, cannot be estimated beforehand."* (Italics ours.)

The contention of the petitioners seems to be that the Court should ignore the language in which the parties embodied their agreements, and that covenants by tenants to indemnify against actual loss when, as and if suffered, should be given the effect of agreements to pay the difference between the stipulated rent and the rental value at the time of the default. The courts will not so lightly set aside the agreements of the parties. As said by Judge Mack in *Western Electric Co., Inc.* v. *Powers Accounting Machine Co.,* an unreported decision cited in the opinion of the Referee in No. 506 (R. 25-26), in denying, in an equity receivership, proof by a landlord of a claim based on a covenant by the tenant to indemnify against loss:

"Nor can the Court adopt some other readily ascertainable measure of damages such as the one that would have prevailed but for express specification of the method of determining the damages. *The Court cannot alter the contractual provisions; the parties have not agreed that the lessee shall be liable for damages and then merely suggested a method of fixing them; they have provided that on such termination, when but for the provisions no*

damages could be claimed, the lessee 'shall be liable for any loss or deficiency of rent which may be suffered'." (Italics ours.)*

It is said that to adhere to the language used by the parties produces a harsh result. Such a contention was met by the New York Court of Appeals in *Hermitage Co.* v. *Levine*, *supra*, at 338-339, as follows:

"We do not overlook the hardship to the landlord in postponing the cause of action until October,

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* The analysis in Judge Mack's opinion in this equity case is so pertinent to the instant cases that we quote in this footnote the essential steps in his reasoning:

"A lease of an interest in real property is the creation or grant of a chattel real; rent reserved is compensation for the enjoyment of the interest during the period for which the rent is paid or is payable; neither insolvency nor bankruptcy of the lessee affects the term created except as the title thereto, unless rejected, becomes the property of the Receiver or Trustee and the latter thereby is subjected to payment of the reserved rent. If the interest be not accepted by Receiver or Trustee either at once or retroactively after a period during which the advisability thereof is under consideration, the interest with the rental obligation remains in and on the insolvent or bankrupt. Insolvency or bankruptcy of itself creates no breach anticipatory or otherwise of the rent obligation because it does not terminate the leasehold estate.

* * * * * * * * * * * *

"The parties may, however, incorporate an executory contract in the lease; that contract may, like other executory contracts, be broken by anticipation; such a breach may, under circumstances, give rise to a claim provable either in bankruptcy or in equity proceedings; it may indeed be deemed retroactive as of the date of the proceedings even if actually created by the subsequent exercise of an option exercisable because of or on the bankruptcy or appointment of a Receiver.

* * * * * * * * * * * *

"If * * * there be a contractual provision for damages on such a termination and the measure of those damages fixed by the agreement be the difference at the time of a termination between the market value of the lease and the discounted value of the rents reserved, and if the termination be reasonably prompt so as to enable a liquidation of the amount before the time for filing proofs shall have expired, then at least in equity proceedings such a claim is provable. *Filene* v. *Weed*, *supra*.

"But, if as in the present case, on such a termination a lessee becomes liable not for an amount then ascertainable but for the entire loss that the lessor may actually suffer during the remainder of the original term, inasmuch as it is clearly impossible to ascertain that loss until the original term shall have expired,—in this case about nine years,—the claim must be rejected as uncertain. *In re Roth & Appel*, *supra*; *Penn. Steel Co.* v. *N. Y. City Ry. Co.*, 198 Fed. 721, 759."

Then follows the paragraph quoted above in the text.

> 1945. * * * If the damage clause as drawn gives inadequate protection, the fault is with the draftsman. The courts are not at liberty to supply its omissions at the expense of a tenant whose liability for the future ended with the cancellation of the lease except in so far as he bound himself by covenant to liability thereafter."

In these cases also the leases were obviously drawn by lawyers. The language for the tenants' covenants was deliberately and carefully chosen. It can neither be disregarded nor can deficiencies be supplied. To disregard carefully drawn contracts or treat them as something different from that which they purport to be, would itself introduce harshness and uncertainty into commercial transactions. We shall now show that there is nothing in the Bankruptcy Act which justifies such a course.

POINT II.

THERE IS NOTHING IN THE LANGUAGE OR HISTORY OF THE BANKRUPTCY ACT OR IN THE DECISIONS OF THIS COURT CONSTRUING IT, WHICH LENDS SUPPORT TO THE CONTENTION THAT THE PETITIONERS' CLAIMS ARE PROVABLE IN BANKRUPTCY. IN EVERY RELEVANT DECISION OF THIS COURT IT APPEARS EITHER EXPRESSLY OR IMPLICITLY THAT SUCH CLAIMS ARE NOT PROVABLE AGAINST THE ESTATE OF A BANKRUPT.

A. Claims like those of the petitioners were not provable under earlier Bankruptcy Acts. There is no indication that the Act of 1898 was designed to change the existing rule.

In determining the provability of claims under the Bankruptcy Act of 1898, this Court has repeatedly given weight to the provisions of earlier acts and to decisions under them.

> *Dunbar* v. *Dunbar*, 190 U. S. 340 (1903);
> *Crawford* v. *Burke*, 195 U. S. 176 (1904);
> *Schall* v. *Camors*, 251 U. S. 239 (1920);
> *Maynard* v. *Elliott*, 283 U. S. 273 (1931).

The Bankruptcy Act of 1841, c. 9, 5 Stat. 440, contained specific provision for the proof of contingent claims.* Nevertheless, claims for future rent as such were held to be non-provable under this statute. *Bosler* v. *Kuhn*, 8 Watts & S. 183 (1844); *Savory* v. *Stocking*, 4 Cush. 607 (1849).

The decision of this Court in *Riggin* v. *Magwire*, 15 Wall. 549 (1872), shows that claims based on indemnity clauses

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* Section 5 of the Act of 1841 provided:

"* * * all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, endorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in presenti; * * *"

such as those in the leases here involved, would likewise have been held to be non-provable under the Act of 1841. The facts in that case were as follows: Riggin, in 1839, had conveyed land to one Ellis and had warranted title. Prior to the conveyance from Riggin to Ellis, the land had belonged to Thomas, a married man, and Mrs. Thomas had never released dower. In 1843 Riggin became bankrupt and received his discharge. Five years later Thomas died. His widow sued the persons then in possession, who had acquired their title from Magwire (to whom Ellis' rights had devolved). Magwire then brought an action against Riggin for the amounts which he had been obliged to expend in purchasing Mrs. Thomas' dower rights. Riggin pleaded his discharge. He urged that the claim for breach of the warranty could have been proved against his bankrupt estate since "the value of the wife's probability of survivorship after the death of her husband might have been calculated on the principles of life annuities". This Court overruled the defense, saying, by Mr. Justice Bradley:

> "In 1843 Martin Thomas was still living and there was no certainty that his wife would ever survive him. *It was uncertain whether there would ever be any claim or demand.* * * * *If an action at law had been brought on the covenant at that time nominal damages at most, if any damages at all, could have been recovered.* It did not come within the category of annuities and debts payable in future, which are absolute existing claims." (Italics ours.)

This decision has a direct bearing upon the instant cases. Riggin's covenant, like those of the tenants here, was to indemnify against actual loss. Whether there would be such a loss could not be determined in the *Riggin* case until Thomas' death, nor here until the expiration of the respective terms. In the *Riggin* case, this Court held that there was nothing in the Bankruptcy Act of 1841 which transmuted Riggin's liability to indemnify against actual

loss into one to pay the estimated amount of a loss which might never occur. There is no reason to give any greater effect to the Bankruptcy Act of 1898.

The Bankruptcy Act of 1867, c. 176, 14 Stat. 517, like the Act of 1841, made provision for the proof of contingent debts and, in addition, contained certain specific provisions as to rent.* The decisions appear to have been unanimous that neither future rent claims as such nor claims arising under indemnity clauses such as those here involved were provable under this Act. See *Ex parte Houghton*, Fed. Case No. 6725 (D. Mass., 1871); *In re May*, Fed. Case No. 9325 (S. D. N. Y., 1874); *In re Commercial Bulletin Company*, Fed. Case No. 3060 (D. La. 1876); and particularly, the well reasoned opinion of Judge Lowell in *Ex parte Lake*, Fed. Case No. 7991 (D. Mass.), referred to on pages 12 and 13, *supra*.

It appears, therefore, that when Congress enacted the Bankruptcy Act of 1898, the rule that landlords were not entitled to prove either future rent claims as such or claims under covenants to indemnify against loss, was already well established. If it was desired to change this rule, and thus to enable landlords to prove in bankruptcy claims on which they could not have sustained actions at law, specific language to that effect should have been used. *Schall* v. *Camors*, 251 U. S. 239 (1920); *Jewell-La Salle Realty Co.* v. *Buck*, 283 U. S. 202 (1931).

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* Section 19 of the Act provided:

"In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

* * * * * * * * * * *

"Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditors may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods."

The petitioners make considerable point of the fact that in England the claims of landlords may be proved in bankruptcy. It is difficult to see what comfort the petitioners can find in the English law. No one denies that it is *possible* for the legislature to make landlords' claims provable. The question, as recognized by the petitioners (p. 21 of their brief), is whether or not it has done so. When Parliament changed the English law in this respect, it left no room for doubt as to its intentions. By specific provision of the Statute of 32 & 33 Vict., c. 71, Sec. 23 (1869), the landlord was given a provable claim for loss resulting from the disclaimer of a lease by a trustee in bankruptcy. The Statute of 1883 (46 & 47 Vict., c. 52) provided broadly in Section 37 (3) for the proof of "* * * all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order," and contained, in Section 55, specific provision for the disclaimer of leases by the trustee and the proof of claims of "any person injured by the operation of a disclaimer."

These provisions of the English bankruptcy statutes and the decisions of the courts thereunder [*Ex parte Llynri Coal Co.*, L. R. 7 Ch. App. 28 (1871); *Ex parte Blake*, 11 Ch. Div. 572 (1879)], must have been known to Congress at the time of the enactment of the Bankruptcy Act of 1898. If Congress had desired to change the rule against the provability of future rent claims which had prevailed under the former bankruptcy acts, it could easily have expressed that desire by language similar to that in the English statutes. Instead, the language of the Act of 1898 was much less favorable than that in earlier bankruptcy acts to the proof of contingent claims. Not until the decision of this Court in *Maynard* v. *Elliott*, 283

U. S. 273 (1931), was it definitely established that certain contingent claims, admittedly provable under the earlier acts, continued to be provable under the Act of 1898.

The reasoning of this Court in *Schall* v. *Camors*, *supra*, is particularly pertinent. In that case the Court held that tort claims, which the lower courts had consistently regarded as non-provable under earlier bankruptcy acts, were likewise non-provable under the Act of 1898. The Court reviewed the Act and its legislative history and found no basis, either in its language or in its history, for a conclusion that Congress intended to depart from the rule theretofore existing.* The same analysis leads inevitably to the conclusion that no change was intended in regard to claims for future rent.

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*The Court said, per Mr. Justice Pitney:

"Our earlier bankruptcy acts invariably have been regarded as excluding from consideration unliquidated claims arising purely *ex delicto*. (Citing authorities.)

"Can it be supposed that the present act was intended to depart so widely from the precedents as to include mere tort claims among the provable debts? Its 63d section does not so declare in terms, and there is nothing in the history of the act to give ground for such an inference. It was the result of a long period of agitation, participated in by commercial conventions, boards of trade, chambers of commerce, and other commercial bodies. To say nothing of measures proposed in previous Congresses, a bill in substantially the present form was favorably reported by the Committee on the Judiciary of the House of Representatives in the First Session of the 54th Congress. Having then failed of passage, it was submitted again in the Second Session of the 55th Congress as a substitute for a Senate bill; after disagreeing votes of the two Houses, it went to conference, and as the result of a Conference Report became law. *It is significant that Sec. 63 defining 'Debts which may be Proved' remained unchanged from first to last, except for a slight and insignificant variance* in clause (5) in the final print, the word 'interests' having been substituted for 'interest'. House Rep. No. 1228, 54th Cong., 1st sess., p. 39; House Rep. No. 65, 55th Cong., 2nd sess., p. 21; Senate Doc. No. 294, 55th Cong., 2d sess., p. 22. Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause b fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely *ex delicto*. *Such claims might easily have been mentioned if intended to be included.* Upon every consideration we are clear that claims based upon a mere tort are not provable." (Italics ours.)

B. The decisions of this Court construing the Bankruptcy Act of 1898 furnish no support to the argument of the petitioners. The Act has consistently been construed by this Court as rendering claims such as those of the petitioners non-provable.

(1) *Dunbar* v. *Dunbar*, 190 U. S. 340 (1903).

The first case in which this Court construed Section 63 of the Bankruptcy Act of 1898 was *Dunbar* v. *Dunbar*, 190 U. S. 340 (1903). In that case, this Court held that the claim of a wife under a contract requiring the husband to make monthly payments so long as she remained unmarried was not provable under the Bankruptcy Act of 1898. While the Court recognized that a similar claim had been held provable under the English bankruptcy statute, it decided that the much more limited language of the Act of 1898 did not permit such proof. The Court quoted with approval the statement by Mr. Justice Bradley in *Riggin* v. *Maguire*, *supra*, "that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable".

(2) *Williams* v. *United States Fidelity & Guaranty Company*, 236 U. S. 549 (1915).

The petitioners make frequent reference to the decision of this Court in *Williams* v. *United States Fidelity & Guaranty Company*, 236 U. S. 549 (1915). They assert (p. 22) that the decision in the *Williams* case "furnishes a chart and compass for the solution of the question". We submit that, so far as the decision in the *Williams* case has any bearing at all upon the present cases, it points to a rejection of the petitioners' claims.

The facts in the *Williams* case were as follows: The United States Fidelity & Guaranty Company had executed

a surety bond guaranteeing the performance by the bankrupts of a construction contract with certain school trustees. The contract had been abandoned long prior to the filing of the petition, and before that date the school trustees had completed the entire construction. The surety company, subsequent to the discharge of the bankrupts, reimbursed the school trustees for the damages sustained by them. It then brought suit for indemnity against the bankrupts. This Court held that their discharge constituted a complete defense.

It was conceded that the claim of the school trustees against the contractors might have been proved in the bankruptcy of the latter. But, as stated in Mr. Justice McReynolds' opinion, counsel for the surety company contended that the claim of the company against the bankrupts on the latters' covenant of indemnity was, at the date of the filing of the petition, still contingent on payment by the company and therefore not provable and not discharged. The decision of this Court was not, as might be inferred from the petitioners' brief, that in spite of this contingency the claim for indemnity was provable. Its decision, on the contrary, was that Section 57i of the Bankruptcy Act, expressly preserving the right of subrogation, operated to deprive the surety of *any* claim to indemnity and confined him to the remedy of proving the original debt against the estate in the name of the creditor. Compare General Order XXI (4).

The decision in the *Williams* case was thus based upon the existence in the Bankruptcy Act of a specific provision construed to require departure from a common law doctrine (*viz.*, the surety's right of indemnity) that would have been applicable in the absence of bankruptcy. The Act contains no such provision requiring, or permitting, a departure from the general rules of the law of landlord and tenant.

(3) *Central Trust Company* v. *Chicago Auditorium Association,* 240 U. S. 581 (1916).

The next decision having a bearing upon the present problem was *Central Trust Company* v. *Chicago Auditorium Association,* 240 U. S. 581 (1916). Two points were there decided. The first was that in the case of an executory commercial contract, in which the promises were interdependent, the filing of a bankruptcy petition by or against one of the parties, when followed by adjudication and rejection of the contract by the trustee, would be deemed to have the same effect as a repudiation of the contract by the bankrupt. The second was that

> "it would be 'an unnecessary and false nicety' to hold that because it was the act of filing the petition that wrought the breach, therefore there was no breach at the time of the petition."

That the doctrine of anticipatory breach was not applicable to leases, was clearly recognized by Mr. Justice Pitney when, in referring to the citation by the trustee of

> "* * * a number of cases arising out of the relation of landlord and tenant * * *"

he stated:

> "Cases of the latter class are distinguishable, because of the 'diversity between duties which touch the realty, and the mere personalty'. Co. Litt. 292, b, Section 513."

(4) *William Filene's Sons Company* v. *Weed,* 245 U. S. 597 (1918).

The next case, and one upon which the petitioners appear to place much reliance, is *William Filene's Sons Company* v. *Weed,* 245 U. S. 597 (1918), wherein it was

held that claims of a landlord arising under the liquidated damage clause quoted on pages 10 and 11, *supra*, might be proved in an equity receivership of the tenant.*

It has already been pointed out that the liquidated damage clause in the *Filene* case differed from the indemnity clauses here involved in an absolutely essential respect. The clause in the *Filene* case provided that the tenant should pay the difference between the stipulated rent and the rental value at the time of default. The amount payable by the tenant was definitely determinable once and for all at that date. In permitting the landlord to prove a claim arising out of such a covenant, the Court was simply enforcing the express contract of the parties. Nevertheless, this Court, in holding that the landlord's claim might be proved in an equity receivership, indicated that even a claim arising out of such a clause could not be proved in bankruptcy, Mr. Justice Holmes saying:

> "When a statutory system is administered the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim

* A like holding was made in the companion case of *Gardiner* v. *Butler & Co.*, 245 U. S. 603 (1918), as regards a lease containing a covenant identical with that in the *Filene* case. However, in the *Gardiner* case, the Court held that a claim of Gardiner's for breach of another lease which contained only a covenant for rent could not be proved against the insolvent estate of Butler & Co. See p. 8, *supra*.

that matures within a reasonable time before distribution can be made. *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. Rep. 721, 740, 741."

(5) *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224 (1930).

The decision in *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224 (1930), is also relied on by the petitioners. In that case, which likewise arose in Massachusetts, the parties, as in the *Filene* case, had drawn a clause which gave the landlord a right to recover damages immediately upon default. There was no assertion by the landlord, as in the present cases, of a right to prove a claim arising from the tenant's covenant to indemnify against losses which may never occur. The claim was disallowed, as against the bankrupt estate of the tenant, because the provision, instead of being a reasonable liquidation of damages as in the *Filene* case, attempted to make the entire future rent the measure of the landlord's damage. The Court refused to enforce the clause on the ground that it was a provision "for an unenforceable penalty".

(6) *Maynard* v. *Elliott*, 283 U. S. 273 (1931).

We come finally to the decision in *Maynard* v. *Elliott*, 283 U. S. 273 (1931), in which this Court held that the holder of notes which had not yet matured at the time of the filing of the petition might prove a claim against the bankrupt estate of an indorser. It is this decision upon which the petitioners principally rely. We believe, on the contrary, that the very line of reasoning which in the *Maynard* case led to a holding of provability, leads inevitably in the instant cases to a holding of non-provability.

The argument for the trustee in the *Maynard* case was, in effect, that under the Bankruptcy Act of 1898, no contingent claims were provable. The answer made by this

Court was based primarily on considerations of history and practice. The Court pointed out that the claims involved were of a nature which by specific provision had been made provable by the Act of 1841 and the Act of 1867. Under the Act of 1898, there had been an unbroken construction that such claims were provable, commencing within three years after the enactment of the statute and not seriously challenged for a period of twenty-six years. With this background, it was held that

> "* * * Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted especially where overturning the established practice would have such far reaching consequences as in the present instance."

The history and practice, as regards the claims here involved, are equally enlightening. Future rent claims were not provable under the Act of 1841 or the Act of 1867 (see pp. 16-18, *supra*). Within two years after the enactment of the Act of 1898, Judge Lowell, one of the foremost authorities in the country on bankruptcy matters, held that the new Act had made no change in the former rule. *In re Ells*, 98 Fed. 967 (D. Mass., 1900). In the same year, future rent claims were held non-provable by the Court of Appeals for the Fifth Circuit in an opinion in which the Court stated that all of the Referees and District Judges who had passed upon the question had taken a similar view. *Atkins* v. *Wilcox*, 105 Fed. 595 (C. C. A. 5th, 1900). Five years later the Court of Appeals for the Eighth Circuit, the Court being composed of Judge Sanborn, Mr. Justice (then Judge) Van Devanter and District Judge Phillips, in *Watson* v. *Merrill*, 136 Fed. 359 (1905), announced a similar conclusion. Five years thereafter the Court of Appeals for the Second Circuit in *In re Roth & Appel*, 181 Fed. 667 (1910), and the Court of Appeals for the First Circuit in *Slocum* v. *Soliday*, 183 Fed. 410 (1910), reached the same result. The

same rule was adopted in the Ninth Circuit in *Colman Company* v. *Withoft,* 195 Fed. 250 (1912), and in the Sixth Circuit in *Wells* v. *Twenty-First St. Realty Company,* 12 F. (2d) 237 (1926).* The doctrine in these cases has been relied upon by innumerable bondholders and merchandise creditors in extending credit to lessees, both individual and corporate, and by landlords in making leases with individual lessees and in failing to file proofs of claim for future rent against the estates of bankrupt lessees. The language of the Court in the *Maynard* case is directly applicable:

> "* * * Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted especially where overturning the established practice would have such far reaching consequences."

Not only is the entire basis of the decision in *Maynard* v. *Elliott* lacking in the case of claims such as are here involved, but the operative facts are radically different. Contingent obligations on indorsements are commonly regarded as liabilities in commercial practice and are shown as such on balance sheets of the indorser. The amount of the indorser's liability is definitely fixed. In cases where

* The petitioners' brief (p. 17) refers to the statement by the Court below in its opinion in No. 505, that "the rule in the Third and Seventh Circuits is otherwise" (R. 28). It is believed that this statement goes much farther than the decisions warrant. The cases in the Third Circuit apparently permit proof of a claim, not for damages, but for rent as such, which has been accelerated in accordance with the provisions of the lease. The landlord is not permitted to resume possession of the premises, and the leasehold becomes part of the general assets of the estate. *In re Keith-Gara Company,* 203 Fed. 585 (E. D. Pa., 1913), affirmed on opinion below, 213 Fed. 450 (C. C. A. 3d, 1914); *Rosenblum* v. *Uber,* 256 Fed. 584 (C. C. A. 3d, 1919); *Electric Appliance Co.* v. *Ellis,* 4 F. (2d) 108 (C. C. A. 3d, 1925). These decisions are thoroughly consistent with the position taken in this brief. So far as the Seventh Circuit is concerned, it appears from the recent decision in *In re National Credit Clothing Co., Inc.,* 66 F. (2d) 371 (C. C. A. 7th, 1933), that the Court of Appeals for that circuit is in accord with the majority view. The Court of Appeals stated that the claim there in question could be supported only if there were facts which distinguished the case from the decisions "which hold that in states where the common law prevails a claim for damages for anticipatory breach of a lease of real estate is not provable in bankruptcy", and cited with approval the decisions in the Second, Sixth and Eighth Circuits above mentioned.

the solvency of the maker has not been determined when the claim is liquidated, the claimant will be obliged to account to the bankrupt estate of the indorser to the extent that his collections exceed the amount of the note, and this right of the bankrupt estate can be realized on at a judicial sale. See *In re Manhattan Brush Manufacturing Company*, 209 Fed. 997 (S. D. N. Y., 1913). The case bears no analogy to that of a claim arising out of a covenant to indemnify against loss over a period of years, where any attempt to determine whether or not a loss will occur, is pure conjecture.

Moreover, this Court in the *Maynard* case was careful to point out the precise limitations of its decision, and not to leave these to inference, however compelling such inference might be. The Court recognized that there were many contingent claims which were not provable, saying by Mr. Justice Stone:

> "That some contingent claims are deemed not provable does not militate against this conclusion. The contingency of the bankrupt's obligation may be such as to render any claim upon it incapable of proof. It may be one beyond the control of the creditor *and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach. Re Merrill & Baker,* 186 Fed. 312. Such a claim could not be proved under the Act of 1841 although in terms permitting proof of contingent claims. *Riggin* v. *Magwire*, 15 Wall. 549. *Or the contingency may be such as to make any valuation of the claim impossible, even though liability has attached.* Of this latter class was the claim upon the bankrupt's contract to pay his divorced wife a specified amount annually so long as she should remain unmarried, proof of which was for that reason rejected in *Dunbar* v. *Dunbar, supra*; see *Atkins* v. *Wilcox*, 105 Fed. 595." (Italics ours.)

This language applies directly to the instant cases. The only covenant of the bankrupts which has survived re-entry by the landlords is their covenant to indemnify against loss. Whether there will be a loss is an event exactly as fortuitous as whether the bankrupt would ever have been obliged to respond under the guaranty involved in *Re Merrill & Baker*. The contingency whether these landlords will gain or lose as a result of the breach of these leases is dependent on events no more capable of prediction than was the contingency as to whether Mrs. Thomas would survive her husband, which was held fatal to provability in *Riggin* v. *Maguire*. And it is significant that the final illustration given in Mr. Justice Stone's opinion, of a claim so contingent as to be non-provable, is *Atkins* v. *Wilcox*, the first in the long line of authorities holding that claims for future rent are not provable under the Bankruptcy Act of 1898.

We repeat that, where the parties to a lease have not provided for the payment of liquidated damages by the tenant, the courts cannot supply a covenant to that effect.

POINT III.

THE REFUSAL BY CONGRESS TO EXTEND TO OTHER PROCEEDINGS IN BANKRUPTCY THE PROVISIONS OF THE AMENDATORY BANKRUPTCY LAW OF MARCH 2, 1933, WHICH RENDERED FUTURE RENT CLAIMS PROVABLE IN PROCEEDINGS UNDER THE SECTIONS THEN ADDED TO THE BANKRUPTCY ACT, SHOULD MAKE THIS COURT RELUCTANT TO CHANGE THE ESTABLISHED RULE AGAINST THE PROVABILITY OF THE CLAIMS HERE INVOLVED.

Where the construction of a statute has been established and it has thereafter been repeatedly re-enacted or amended in other respects by Congress, the courts are necessarily reluctant to adopt a different construction.

> *United States* v. *Ryan*, 284 U. S. 167 (1931);
> *Carroll Electric Co.* v. *Snelling*, 62 F. (2d) 413 (C. C. A. 1st, 1932).

In the *Snelling* case, the Court of Appeals for the First Circuit applied this principle in construing Section 57n of the Bankruptcy Act of 1898 in accordance with a decision of a District Court made in 1910, the Court saying:

> "This decision was made twenty-two years ago. The Bankruptcy Act has been several times substantially amended, the last time in 1926. As already noted, section 57n was then amended by halving the period of one year for ordinary creditors. But Congress did not see fit to amend the balance of this section, so as to prevent the proof of claims unless the liquidating litigation was begun within six months. This court would not be warranted in assuming that the learned lawyers in Congress, active in the genesis of the amendments adopted, were ignorant of this well-reasoned opinion. In 2 Remington Bankruptcy (3d Ed. [1923]) §878, the opin-

ion is regarded by this leading writer on bankruptcy as of sufficient importance to warrant nearly two pages of quotation therefrom. *Under such circumstances, this considered opinion of an experienced and distinguished judge may fairly be regarded as adopted by the lawmaking body.*"

As above stated (pp. 26-27, *supra*), the rule that future rent claims are not provable under the Bankruptcy Act of 1898 was declared by the Court of Appeals for the Fifth Circuit in 1900, by the Court of Appeals for the Eighth Circuit in 1905, by the Courts of Appeals for the First and Second Circuits in 1910, by the Court of Appeals for the Ninth Circuit in 1915, and by the Court of Appeals for the Sixth Circuit in 1926. While the precise point had not been squarely raised in this Court, approval of the decisions below had been strongly indicated, particularly by Mr. Justice Pitney, writing for the Court in the *Auditorium* case in 1916, and by Mr. Justice Holmes, writing for the Court in the *Filene* case in 1918. Between 1898 and 1933, the Bankruptcy Act was seven times amended, amendments of great importance having been made in 1910 and in 1926.* On none of these occasions did Congress in any way modify the section defining provable claims.

The present situation, however, is not merely one of amendments to the Act which do not purport to alter the established rule of construction, *but of an amendment which expressly provides for a different rule in a new category of proceedings.* By the Amendatory Bankruptcy Law of March 3, 1933, c. 204, 47 Stat. 1467, Congress added to the Bankruptcy Act new sections authorizing proceedings for compositions and extensions to debtors, for agricul-

* Acts of February 5, 1903, c. 487, 32 Stat. 797; June 15, 1906, c. 3333, 34 Stat. 267; June 25, 1910, c. 412, 36 Stat. 838; March 2, 1917, c. 153, 39 Stat. 999; Jan. 7, 1922, c. 22, 42 Stat. 354; May 27, 1926, c. 406, 44 Stat. 662; Feb. 11, 1932, c. 38, 47 Stat. 47.

tural compositions and extensions, and for the reorganization of railroads engaged in interstate commerce. Congress provided that in two of these new types of proceedings claims for future rent should constitute provable debts and be liquidated under Section 63b.*

There is simply no evidence to support the argument of the petitioners that these provisions were meant to be declaratory of the existing law. The whole tenor of the amendment is to the contrary. The petitioners argue (p. 59 of their brief) that "Congress would not have referred to them [*i. e.*, future rent claims] as provable or not if it intended to treat them as not provable under prior law." The obvious answer is that the provision related not only to future rent claims but to "all claims of whatever character", many of which, of course, were provable under prior law. The petitioners also rely on the absence of provision as to the application of the amendment to "pending proceedings". The necessity for such provision in an amendment which applied only to the new types of proceedings authorized by its terms, is not apparent. We submit that the only possible construction of the provisions in question

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* The relevant provisions are:

"Section 74. Compositions and Extensions.—(a) * * * The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. * * * The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63(b) of this Act."

"Section 77. Reorganization of railroads engaged in Interstate Commerce.—(b) * * * The term 'creditors' shall, except as otherwise specifically provided in this section, include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this Act."

was that made by the court below. As stated by Judge Learned Hand in the opinion in No. 505 (R. 29), Congress

> "* * * changed the law in this precise respect in one situation, but did not do so in this."

The considerations which led to the making by Congress of these special provisions that future rent claims should be provable in proceedings under the sections added to the Bankruptcy Act by the Act of March 3, 1933, are clear. The purpose of Congress was to give relief of the broadest character to individual debtors seeking the benefit of the provisions of the amendment. This purpose would be frustrated if certain creditors might insist on full performance from the debtor because their claims were not of a character provable in ordinary proceedings in bankruptcy. The necessity, for this reason, of broadening the definition of provable claims in proceedings under the new sections, was stated on the floor of the Senate by Senator Hastings who had charge of the bill. He said (76 Congressional Record 4906):

> "* * * we have undertaken in these sections to include all the claims that could be had against a debtor so that when he got relief, he might know that he had relief from every kind of a claim that might be had against him."

In other words, the special provision in Section 74 was enacted as a boon, not to landlords, but to individual debtors availing themselves of the provisions of that section.

It is significant that Congress appears to have thought that it was not enough to make provable in proceedings under the new sections, "all claims of whatever character against the debtor or his property * * * whether or not such claims would otherwise constitute provable claims

under this Act". Special mention was thought necessary to bring claims for future rent within the area of provability. Such "claims" differ essentially from other claims (such as for torts) excluded from provability by Section 63a of the Act of 1898. A cause of action sounding in tort is nevertheless a claim. It is not provable since it is not a claim "founded upon an open account, or upon a contract express or implied". *Schall* v. *Camors*, 251 U. S. 239 (1920). Quite different are "claims" such as those here involved. No judgment could have been recovered in respect of them at the date when the petition was filed. Language permitting proof of "all claims of whatever character" might not suffice to make provable something which was not properly a claim at all.

Congress thus believed very specific enactment to be necessary in order to render claims for future rent provable even under the broad language of Sections 74 and 77. Had Congress desired to change the rule as to such claims applicable in ordinary proceedings in bankruptcy, it would have found no difficulty in devising language to that end. Surely, in the face of this recent refusal by Congress to alter the rule established under prior Bankruptcy Acts and by a long line of decisions under the Act of 1898, this Court should not now adopt a different rule, when in the Court's own language in the *Maynard* case, "overturning the established practice would have such far-reaching consequences".

Respectfully submitted,

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